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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re A.S., A Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

A.S.,

Defendant and Appellant.

B256848

(Los Angeles County
Super. Ct. No. MJ13974)

APPEAL from an order of the Superior Court of Los Angeles County,
Nancy S. Pogue, Commissioner. Affirmed.

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D.
Matthews, Analee J. Brodie and Michael Keller, Deputy Attorneys General, for
Plaintiff and Respondent.

The juvenile court sustained a petition alleging that appellant A.S. threatened a public employee. Appellant challenges the juvenile court's determinations regarding the petition. We affirm.

PROCEDURAL BACKGROUND

On November 7, 2013, a petition was filed under Welfare and Institutions Code section 602, charging appellant with threatening a public officer or employee (Pen. Code, § 71).¹ On May 5, 2014, after sustaining the petition, the juvenile court determined the offense to be a felony, declared appellant a ward of the court, and placed him on probation in the custody of his mother.

FACTS

A. Prosecution Evidence

Kohji Carrigan was the sole prosecution witness regarding the incident underlying the charge against appellant, which occurred on September 6, 2013. In September 2013, Carrigan taught history at the Eastside High School. Appellant was then a student in Carrigan's class. According to Carrigan, appellant had shown little progress in the class, was often "off task," and made inappropriate comments, including derogatory statements. On numerous occasions, Carrigan talked to appellant, who did not change his conduct, and sometimes engaged in "back talking."

On September 6, 2013, during the second period of the school day, appellant was in Carrigan's classroom. Near the end of the period, Carrigan told his students to ready themselves for the bell. As they did so, they conversed with one another and prepared to leave the classroom. Appellant, who stood near the classroom

¹ All further statutory citations are to the Penal Code.

door, began hitting or tapping a wall. Carrigan walked toward appellant, who moved to another wall and began pulling off a college banner attached to it.

When Carrigan asked appellant to stop, appellant told Carrigan not to blame him, and then said, “I’m going to fuckin’ sock your --.” Although Carrigan did not hear the end of appellant’s remark, he felt threatened. Carrigan testified that appellant appeared to be agitated or annoyed; that his tone of voice was “confrontational,” though “low volume” or “soft”; and that he faced Carrigan nearly directly at a distance of approximately three to four feet. In order to de-escalate the situation, Carrigan again asked appellant to stop, and then returned to his desk. He took no other action because he believed that doing so would aggravate the situation. The class bell rang, and the students left the classroom, including appellant. Later, after Carrigan reported the incident to the school’s vice principal, appellant was transferred out of Carrigan’s class.

B. Defense Evidence

Appellant denied threatening Carrigan, and maintained he never intended to stop Carrigan from performing his duties as a teacher. Appellant testified that on September 6, 2013, he was upset “from personal stuff” when he entered Carrigan’s classroom. He “tuned the whole class out,” and minded his own business. After Carrigan told the students to prepare for the end of the class, appellant joined other students standing in a line near the door. When he leaned against a wall, his shoulder brushed a college banner. Because the banner was poorly secured to the wall, it fell, and appellant tried to pin it back on the wall. Carrigan called appellant aside, and asked why he had ripped the banner down. Appellant replied, “I didn’t,” stated that he was putting it back, and walked away from Carrigan. Appellant denied using the “F-word” in any remark to Carrigan. When Carrigan

told appellant that he had called security, appellant walked out of the classroom. After appellant left the classroom, the class bell rang, and a security officer picked him up.

John G. and Ashley R. testified that on September 6, 2013, they were present as students in Carrigan's classroom. John G. stated that near the end of the class, he saw Carrigan and appellant talking near Carrigan's desk, but heard no threats or angry words. According to Ashley, near the end of the class, Carrigan spoke to appellant while both were standing close to the classroom door. Ashley, who was approximately ten feet away, heard no threats from appellant. Carrigan then walked back to his desk, and appellant left the classroom "without any incident."

DISCUSSION

Appellant contends (1) that his remarks to Carrigan constituted protected speech under the First Amendment of the United States Constitution, and (2) that there is insufficient evidence to support the sustained petition for threatening a public employee. For the reasons explained below, we disagree.

A. Governing Principles

"The purpose of [section 71] is to prevent threatening communications to public officers or employees designed to extort their action or inaction. [Citation.] The essential elements [of the offense] are: "(1) A threat to inflict an unlawful injury upon any person or property; (2) direct communication of the threat to a public officer or employee; (3) the intent to influence the performance of the officer or employee's official duties; and (4) the apparent ability to carry out the

threat.” [Citations.]” (*In re Ernesto H.* (2004) 125 Cal.App.4th 298, 308 (*Ernesto H.*).)²

Generally, the trial court’s findings under section 71 are reviewed for the existence of substantial evidence.³ (*Ernesto H. supra*, 125 Cal.App.4th at p. 313.) However, to the extent appellant contends his remarks constitute protected speech, rather than a threat, our review is subject to the principles set forth in *In re George T.* (2004) 33 Cal.4th 620 (*George T.*). (*Ernesto H., supra*, 125 Cal.App.4th at p. 306.) When a defendant raises a plausible First Amendment defense that a communication was protected speech, we make an independent examination of the record to determine whether the communication was a true threat. (*George T., supra*, 33 Cal.4th at p. 632; *Ernesto H., supra*, 125 Cal.App.4th at p. 306.) As our

² Subdivision (a) of section 71 provides: “Every person who, with intent to cause, attempts to cause, or causes, any officer or employee of any public or private educational institution or any public officer or employee to do, or refrain from doing, any act in the performance of his duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out, is guilty of a public offense”

³ Generally, “[t]he proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder. [Citations.]’ [Citation.]” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Supreme Court has explained, “[i]ndependent review is particularly important in the threats context because it is a type of speech that is subject to categorical exclusion from First Amendment protection” (*George T.*, *supra*, at p. 634.) However, “[i]ndependent review is not the equivalent of de novo review ‘in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes’ the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue. [Citations.]” (*George T.*, *supra*, at p. 634, quoting *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 514, fn. 31.)

B. *Existence of A Threat*

We begin with appellant’s contention that his remarks to Carrigan were not a true threat, and instead constituted protected speech. Appellant argues that his remark, “I’m going to fuckin’ sock your --,” as heard by Carrigan, was an ambiguous incomplete sentence, and that Carrigan did not testify that he believed that appellant would inflict an injury on him. For the reasons discussed below, we reject his contention.

“‘A threat is an “expression of an intent to inflict evil, injury, or damage on another.’” [Citation.] When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection.’” (*People v. Toledo* (2001) 26 Cal.4th 221, 233 (*Toledo*), italics deleted, quoting *In re M.S.* (1995) 10 Cal.4th 698, 710.) To determine whether appellant’s remark was a threat, “we must examine not only the words spoken but

also the circumstances surrounding the communication.” (*Ernesto H.*, *supra*, 125 Cal.App.4th at p. 310.)

We find guidance on appellant’s contention from *Ernesto H.* There, a high school physical education teacher prevented two students from fighting during his class. (*Ernesto H.*, *supra*, 125 Cal.App.4th at p. 303.) After the class, in order to continue the fight, the two students went to a secluded area of the school, accompanied by a third student, who acted as a lookout. (*Ibid.*) When the teacher ordered the students to stop fighting, the lookout called out to the teacher in an apparent effort to distract him. (*Ibid.*) The teacher told the lookout that what he was doing was not ““okay,”” and again yelled at the students to stop fighting. (*Ibid.*) The lookout replied, ““Don’t yell at me,”” and then said, ““Yell at me again and see what happens.”” (*Id.* at pp. 303-304.) As the lookout spoke, his head was slightly tilted, his hands appeared to be clenched at his sides, and he took a step forward. (*Id.* at pp. 303-304.) When the teacher asked the lookout whether he was making a threat, the lookout did not deny doing so. (*Id.* at p. 304.) The teacher felt threatened, and fearing for his safety, reported the lookout to the school administration. (*Ibid.*)

In affirming the lookout’s conviction under section 71, the appellate court rejected his contention that the remark, ““Yell at me again and see what happens,”” amounted to constitutionally protected speech because it conveyed nothing more than an intention to engage in some nonviolent action. (*Ernesto H.*, *supra*, 125 Cal.App.4th at p. 311.) Based on an independent review of the record, the court concluded that although the remark was ambiguous when viewed in isolation, the surrounding circumstances established that it was a threat, and thus was unprotected speech under the First Amendment. (*Id.* at pp. 310-313.) As the court observed, when the lookout spoke, he was upset, stepped toward the teacher, and

did not deny that he was making a threat when asked; furthermore, the teacher felt threatened and believed the lookout to be serious. (*Id.* at p. 313.)

We reach the same conclusion here. As the trial court accepted Carrigan's version of the underlying events, the focus of our independent review is on his testimony. According to Carrigan, on numerous occasions prior to the underlying incident, he talked to appellant regarding classroom misconduct. The incident itself began when appellant hit or tapped the classroom wall and pulled down a college banner. When Carrigan asked appellant to stop, appellant told Carrigan not to blame him, and then said, "I'm going to fuckin' sock your --." Carrigan did not hear the end of appellant's remark, apparently due to the noise of other students preparing to leave the classroom. Appellant appeared to be agitated or annoyed, and although he spoke at a "low[]volume," his tone was "confrontational." At the time, appellant was three or four feet from Carrigan, and was facing him.

Carrigan testified as follows regarding his response to appellant's remark:

"Q. [By the prosecutor] And when you heard [the remark], what were some of your feelings, if you had any? [¶] . . . [¶]

"[Carrigan]: *I felt threatened.*

"Q. . . . Why is that?

"A. Any time that kind of language is used in a classroom, I feel that it is inappropriate.

"Q. And did you believe that this minor was going to carry out what he said?

"A. I cannot know his intention, *but I felt threatened.*

"Q. And what, if anything, did you do?

"A. I went to my desk. *I tried to deescalate the situation*" (Italics added.) Carrigan further testified that he took no further action beyond telling

appellant to “[s]top it” because he believed that doing more would have “aggravate[d] the situation.”

In our view, appellant’s remark was a threat. To begin, a reasonable person would regard the remark, placed in context, as communicating appellant’s intention to inflict imminent physical harm on Carrigan. (*Toledo, supra*, 26 Cal.4th at p. 233.) Appellant’s remark was more specific than that uttered in *Ernesto H.*, as the words “I’m going to fuckin’ sock your --” clearly conveyed an intent to forcefully strike some part of Carrigan’s person.⁴ Any conceivable ambiguity created by the absence of a direct object in the remark is eliminated by the surrounding circumstances. Appellant’s preceding acts of hitting a classroom wall and pulling down a banner, together with his willful denial of blame for that conduct, confrontational tone of voice, and visible agitation, established appellant’s intention to “sock” Carrigan.

Furthermore, the record establishes that the remark led Carrigan to believe he faced imminent physical injury, even though he did not directly testify that he held that belief. According to Carrigan, appellant’s statement of intent to “sock” him caused Carrigan to feel threatened, and induced him to deescalate the situation. He thus returned to his desk, and aside from saying, “Stop it,” took no action to restrain appellant in order to avoid aggravating the situation. Accordingly, viewed in context, appellant’s remark constituted a threat not subject

⁴ The word “sock” means “to deliver a blow: HIT.” (Webster’s 3d New Internat. Dict. (2002) p. 2163; Merriam-Webster’s Collegiate Dict. (10th ed. 1995) p. 1115.)

to First Amendment protection, as the remark reasonably caused Carrigan to believe that he faced imminent physical violence.⁵

Appellant's reliance on *George T.*, *In re Ryan D.* (2002) 100 Cal.App.4th 854 (*Ryan D.*), and *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*) is misplaced. In *George T.*, a high school student was charged with making a criminal threat under section 442 after writing a poem a fellow student perceived as containing threats to her.⁶ (*George T.*, *supra*, 33 Cal.4th at pp. 624-625.) When the juvenile court found the criminal threat allegation to be true, the high school

⁵ Appellant suggests there is no evidence Carrigan reasonably believed that appellant would carry out his threat, pointing to the following portion of Carrigan's testimony:

"Q. And did you believe that this minor was going to carry out what he said?

"A. I cannot know his intention, but I felt threatened."

Carrigan's qualification regarding his "knowledge" does not show that he lacked the belief that appellant intended to "sock" him; on the contrary, Carrigan's testimony established that he had that belief, and acted upon it. Furthermore, as explained above, appellant's remark and its surrounding circumstances rendered the belief reasonable.

⁶ Subdivision (a) of section 422 provides: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

student contended on appeal that his poem was subject to First Amendment protection. (*Id.* at p. 630.) In concluding that the poem was protected speech, the Supreme Court determined that it did not constitute an “unequivocal” threat under section 442, as its language was ambiguous, and there was otherwise no history of animosity between the students. (*George T.*, *supra*, at pp. 630-639.) In contrast, appellant’s remark did not purport to be a poem, its language was unambiguous, and the surrounding circumstances established that it was a true threat.

In *Ryan D.*, a police officer arrested a juvenile for possession of marijuana. (*Ryan D.*, *supra*, 100 Cal.App.4th at pp. 857-858.) The juvenile painted a picture of himself shooting the officer and submitted it as an art project in his high school painting class. (*Ibid.*) Reversing the juvenile’s conviction for making a criminal threat under section 422, the appellate court concluded that the painting did not constitute an “unequivocal” threat to the officer, as there was no evidence the juvenile intended the officer to see or learn of it. (*Ryan D.*, *supra*, at pp. 860-862.) Here, appellant spoke directly to Carrigan.

In *Ricky T.* a juvenile cursed at a teacher and said, “I’m going to get you,” after the teacher accidentally hit him with a door while opening it. (*Ricky T.*, *supra*, 87 Cal.App.4th at p. 1135.) The appellate court concluded there was insufficient evidence that the remarks constituted an “unequivocal” threat under section 422, as the juvenile apologized for the remarks and had no history of misconduct toward the teacher. (*Ricky T.*, *supra*, at pp. 1137-1138.) In contrast, appellant offered no apology to Carrigan, and the circumstances surrounding his remark otherwise show that it was a threat, for purposes of section 71. In sum, appellant’s remark constituted a threat not subject to First Amendment protection.

C. Intent to Influence the Performance of Carrigan's Duties

We turn to appellant's remaining contention, which challenges the sufficiency of the evidence to support the juvenile court's finding that appellant intended his remark to influence the performance of Carrigan's duties. Appellant argues that there was no evidence he intended to influence any particular act by Carrigan. We disagree.

As explained in *Ernesto H.*, "among the many duties of a high school teacher are the duties of maintaining order, preventing fighting, and keeping students safe." (*Ernesto H.*, *supra*, 125 Cal.App.4th at p. 314.) Here, the record establishes appellant's intent to deter Carrigan from controlling his misconduct. Appellant initially drew Carrigan's attention by hitting a wall and pulling down a college banner. When Carrigan asked him to stop, appellant made his threat. Believing that it was necessary to de-escalate the situation, Carrigan again asked appellant to stop, retreated to his desk, and took no further action. On this record, the juvenile court reasonably concluded that appellant's remarks were intended to deter Carrigan from taking significant action to restrain appellant's misconduct, and that, in fact, the remarks achieved that goal.

People v. Tuilaepa (1992) 4 Cal.4th 569 (*Tuilaepa*) and *People v. Boyd* (1985) 38 Cal.3d 762 (*Boyd*), upon which appellant relies, are distinguishable. In *Tuilaepa*, the defendant was charged with murder and attempted robbery. (*Tuilaepa*, *supra*, 4 Cal.4th at pp. 576-577.) After the defendant was convicted of the crimes, a penalty trial was conducted to determine whether the death penalty should be imposed. (*Ibid.*) During that trial, the prosecution presented evidence of the defendant's alleged prior crimes, including threats he made while held in a maximum security California Youth Authority facility. (*Id.* at pp. 579-581.) Our Supreme Court concluded the threats did not constitute violations of section 71,

reasoning that there was no showing the defendant had the intent to interfere with the performance of official duties, as he made the threats while locked in a maximum security cell to officials outside the cell. (*Tuilaepa, supra*, 4 Cal.4th at p. 590.) In view of the fact that appellant made his threat while standing close to Carrigan, we find *Tuilaepa* inapposite.

In *Boyd*, which also involved a death penalty trial, the prosecution presented evidence of the defendant's alleged prior crimes, including that he threatened to kill juvenile hall counselors and a high school employee. (*Boyd, supra*, 38 Cal.3d at pp. 767, 770-771.) After reversing the imposition of the death penalty on grounds unrelated to the threats, the Supreme Court addressed issues relating to the admission of the threat evidence for the guidance of the trial court upon re-trial. (*Id.* at pp. 771-779.) In the course of that discussion, the court noted that the threat evidence, as admitted, was insufficient to establish a violation of section 71 because there was no showing that when the threats were made, the defendant had the intent or capacity to interfere with the performance of official duties. (*Boyd, supra*, at pp. 777-778.) As explained above, that showing was made here. In sum, the record establishes that appellant intended his remark to influence the performance of Carrigan's duties.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.